

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DANITA HERNANDEZ-COLWASH,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

NO: 2:15-CV-3116-RMP

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND REMANDING  
FOR FURTHER PROCEEDINGS

BEFORE THE COURT are Plaintiff Danita Hernandez-Colwash's Motion for Summary Judgment, **ECF No. 13**, and Defendant Commissioner of Social Security Carolyn W. Colvin's Motion for Summary Judgment, **ECF No. 18**. The Court has reviewed the motions, the reply memorandum (ECF No. 19), the administrative record, and is fully informed.

**BACKGROUND**

Danita Hernandez-Colwash protectively filed an application for Supplemental Security Income (SSI) on April 18, 2011. ECF No. 9-2 at 24, Tr. 23. Ms. Hernandez-Colwash alleged disability beginning October 31, 2009. *Id.*

Ms. Hernandez-Colwash's application was denied initially on July 7, 2011, and

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1 upon reconsideration on October 6, 2011. *Id.* Ms. Hernandez-Colwash requested a  
2 hearing, which was held via video conference before Administrative Law Judge  
3 (“ALJ”) Virginia M. Robinson on July 20, 2013. *Id.* Ms. Hernandez-Colwash was  
4 present and represented by counsel D. James Tree. *Id.* The ALJ heard testimony  
5 from vocational expert (“VE”) Kimberly Mullinax. *Id.*

6 The ALJ found that Ms. Hernandez-Colwash had not engaged in substantial  
7 gainful work, as defined in 20 C.F.R. § 416.920(b), since the application date of  
8 April 18, 2011. ECF No. 9-2 at 26, Tr. 25. Further, the ALJ found that  
9 Ms. Hernandez-Colwash had the following severe impairments as defined by 20  
10 C.F.R. § 416.920(c): degenerative disc disease of the lumbar spine, obesity,  
11 attention deficit hyperactivity disorder (ADHD), affective disorder not otherwise  
12 specified (NOS), anxiety disorder NOS, and polysubstance addiction disorder. *Id.*

13 However, the ALJ found that Ms. Hernandez-Colwash did not have an  
14 impairment or combination of impairments that met or medically equaled the  
15 severity of one of the listed impairments in 20 C.F.R. Part 416, Subpart I,  
16 Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925, and 416.926). ECF No. 9-2 at 27,  
17 Tr. 26. The ALJ further found that Ms. Hernandez-Colwash had the residual  
18 functional capacity (“RFC”) to

19 perform light work as defined in 20 CFR 416.967(b) except she can  
20 occasionally climb ladder, rope, scaffolding, ramps, or stairs. She can  
21 occasionally stoop, kneel, crouch, or crawl. She should avoid  
concentrated exposure to pulmonary irritants, vibration, or workplace  
hazards. She can perform and persist at unskilled work, can tolerate

1 superficial contact with the general public. She can still give and  
2 receive basic directions and respond to simple questions from the  
3 general public, but cannot engage in mediation, negotiation, or problem  
4 solving with members of the general public.

5 ECF No. 9-2 at 29, Tr. 28.

6 Given Ms. Hernandez-Colwash's age, education, work experience, and RFC,  
7 the VE testified that there were a number of jobs available in the national economy  
8 for an individual sharing her characteristics. ECF No. 9-2 at 38, Tr. 37. The ALJ  
9 then found that "the claimant is capable of making a successful adjustment to other  
10 work that exists in significant numbers in the national economy." *Id.* The ALJ  
11 concluded that Ms. Hernandez-Colwash was not under a disability as defined by  
12 the Social Security Act. *Id.* Ms. Hernandez-Colwash's application was denied on  
13 September 27, 2013. *Id.*

14 Ms. Hernandez-Colwash filed a request for review by the Appeals Council,  
15 which was denied on April 30, 2015. ECF No. 9-2 at 2, Tr. 1. Ms. Hernandez-  
16 Colwash then filed a complaint in the District Court for the Eastern District of  
17 Washington on July 2, 2015, ECF No. 1, and the Commissioner answered the  
18 complaint on September 14, 2015. ECF No. 8. This matter is therefore properly  
19 before the Court pursuant to 42 U.S.C. § 405(g).

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## STATEMENT OF FACTS

The facts of this case are set forth in the administrative hearing transcripts and record, ECF No. 9. Ms. Hernandez-Colwash was 37 years old when she applied for SSI and 39 years old at the hearing. *See* ECF No. 9-2 at 24, Tr. 23.

## STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's final decision. 42 U.S.C. § 405(g). A reviewing court must uphold the Commissioner's decision, determined by an ALJ, when the decision is supported by substantial evidence and not based on legal error. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). Substantial evidence is more than a mere scintilla, but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation omitted).

The reviewing court should uphold "such inferences and conclusions as the [Commissioner] may reasonably draw from the evidence." *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the Commissioner's decision. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *see also Green v. Heckler*, 803 F.2d 528, 530 (9th Cir. 1986) ("This court must consider the record as a whole, weighing both the evidence that supports and detracts from the [Commissioner's]

1 conclusion.”). “[T]he key question is not whether there is substantial evidence that  
 2 could support a finding of disability, but whether there is substantial evidence to  
 3 support the Commissioner’s actual finding that claimant is not disabled.” *Jamerson*  
 4 *v. Chater*, 112 F.3d 1064, 1067 (9th Cir. 1997).

5 It is the role of the trier of fact, not the reviewing court, to resolve conflicts  
 6 in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one  
 7 rational interpretation, the reviewing court may not substitute its judgment for that  
 8 of the Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Thus,  
 9 if there is substantial evidence to support the administrative findings, or if there is  
 10 conflicting evidence that will support a finding of either disability or nondisability,  
 11 the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226,  
 12 1229–30 (9th Cir. 1987).

### 13 SEQUENTIAL PROCESS

14 Under the Social Security Act (the “Act”),

15 an individual shall be considered to be disabled . . . if he is unable to  
 16 engage in any substantial gainful activity by reason of any medically  
 17 determinable physical or mental impairment which can be expected to  
 result in death or which has lasted or can be expected to last for a  
 continuous period of not less than 12 months.

18 42 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be  
 19 determined to be under a disability only if her impairments are of such severity that  
 20 the claimant is not only unable to do her previous work but cannot, considering the  
 21 claimant’s age, education, and work experience, engage in any other substantial

1 gainful work which exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

2 “Thus, the definition of disability consists of both medical and vocational  
3 components.” *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001).

4 The Commissioner has established a five-step sequential evaluation process  
5 for determining whether a claimant is disabled. 20 C.F.R. § 416.920(a)(4). Step  
6 one determines if the claimant is engaged in substantial gainful activities. If the  
7 claimant is engaged in substantial gainful activities, benefits are denied. 20 C.F.R.  
8 § 416.920(a)(4)(i).

9 If the claimant is not engaged in substantial gainful activities, the ALJ, under  
10 step two, determines whether the claimant has a medically severe impairment or  
11 combination of impairments. If the claimant does not have a severe impairment or  
12 combination of impairments, the disability claim is denied. 20 C.F.R.  
13 § 416.920(a)(4)(ii).

14 If the impairment is severe, the evaluation proceeds to step three, which  
15 compares the claimant’s impairment to a number of listed impairments  
16 acknowledged by the Commissioner to be so severe as to preclude substantial  
17 gainful activity. 20 C.F.R. § 416.920(a)(4)(iii); *see also* 20 C.F.R. § 416, Subpt. I,  
18 App. 1. If the impairment meets or equals one of the listed impairments, the  
19 claimant is conclusively presumed to be disabled. 20 C.F.R. § 416.920(a)(4)(iii).

1 Before proceeding to step four, the claimant's RFC is assessed. 20 C.F.R.  
2 § 416.945(a)(1). An individual's RFC is the ability to do physical and mental work  
3 activities on a sustained basis despite limitations from any impairments. *Id.*

4 If the impairment is not one conclusively presumed to be disabling, the  
5 evaluation proceeds to step four, where the ALJ determines whether the  
6 impairment prevents the claimant from performing work she has performed in the  
7 past. If the claimant is able to perform her previous work, the claimant is not  
8 disabled. 20 C.F.R. § 416.920(a)(4)(iv).

9 If the claimant cannot perform her previous work, the final step considers  
10 whether the claimant is able to perform other work in the national economy in light  
11 of her RFC, age, education, and past work experience. 20 C.F.R.  
12 § 416.920(a)(4)(v).

13 At step five, the initial burden of proof rests upon the claimant to establish a  
14 prima facie case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
15 920, 921 (9th Cir. 1971). The claimant satisfies this burden by establishing that a  
16 physical or mental impairment prevents him from engaging in his previous  
17 occupation. The burden then shifts to the Commissioner to show that (1) the  
18 claimant can perform other substantial gainful activity and (2) a "significant  
19 number of jobs exist in the national economy" which the claimant can perform.  
20 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

## ISSUES

Ms. Hernandez-Colwash asserts that the ALJ committed reversible error by: (1) failing to consider, under step two, whether Ms. Hernandez-Colwash's pelvic fracture and bipolar disorder constitute severe impairments; (2) improperly finding that Ms. Hernandez-Colwash lacked credibility; and (3) improperly disregarding medical opinion evidence. ECF No. 13.

## DISCUSSION

### **I. Severe Impairments at Step Two**

Ms. Hernandez-Colwash asserts that the ALJ committed reversible error by failing to consider whether her pelvic fracture and bipolar disorder constituted severe impairments at step two of the sequential process. ECF No. 13 at 22–24. The Commissioner argues that Ms. Hernandez-Colwash has failed to show harmful error at step two. ECF No. 18 at 2–5.

A severe impairment is one “which significantly limits your physical or mental ability to do basic work activities.” 20 C.F.R. § 416.920(c). Conversely, an impairment is not severe when it is “a slight abnormality (or a combination of slight abnormalities) that has no more than a minimal effect on the ability to do basic work activities.” SSR 96-3p, 1996 WL 374181, at \*1 (July 2, 1996).

The ALJ found that, while Ms. Hernandez-Colwash suffered from severe impairments concerning degenerative disc disease of the lumbar spine, obesity, attention deficit hyperactivity disorder (ADHD), affective disorder not otherwise



1 specified (NOS), anxiety disorder NOS, and polysubstance addiction disorder,  
2 Ms. Hernandez-Colwash's diabetes mellitus does not constitute a severe  
3 impairment as Ms. Hernandez-Colwash "did not make any references to diabetes  
4 or its symptoms" at the hearing and "claimant has subsequently been maintained  
5 on metformin, without any documented complications or changes in the dosage of  
6 this medication." ECF No. 9-2 at 26–27, Tr. 25–26. The ALJ, however, made no  
7 findings as to whether Ms. Hernandez-Colwash's alleged pelvic fracture and  
8 bipolar disorder did or did not constitute severe impairments.

9 As the ALJ did not consider whether Ms. Hernandez-Colwash's pelvic  
10 fracture and bipolar disorder constituted severe impairments, the Court finds that  
11 the ALJ committed error. *See Black v. Astrue*, 472 F. App'x 491, 493 (9th Cir.  
12 2012) ("Substantial evidence does not support the ALJ's conclusion that the  
13 anxiety disorder is not a severe impairment in the absence of any mention of the  
14 disorder.").

15 Although, as noted by the Commissioner, Ms. Hernandez-Colwash carries  
16 the burden of establishing a severe impairment, the record contains numerous  
17 references to both the pelvic fracture, *see* ECF No. 9-7 at 138, Tr. 485 (noting  
18 "left-sided displaced parasymphyseal pubic fracture"); ECF No. 9-8 at 157, Tr. 658  
19 (noting pelvic pain); ECF No. 9-9 at 120, Tr. 826 (noting that "[t]he patient  
20 describes her primary pain as in her pelvis bilaterally, posterior to the hips and the  
21 upper buttocks. It feels like a deep, throbbing pain which extends down through

1 her pelvis into her groin, and she states that when it gets bad, it feels as if her  
2 pelvis is splitting apart. The pain also extends up into her lower back and down her  
3 legs. She states that the pain is not in any particular distribution but just affects her  
4 whole leg bilaterally all the way down to the feet. The pain makes her legs feel  
5 tired and sore.”), and bipolar disorder. *See* ECF No. 9-8 at 96, Tr. 597 (“She fulfills  
6 criteria for a manic episode and, as an episode of major depression is not needed  
7 for the diagnosis, she fulfills criteria for Bipolar I Disorder.”); ECF No. 9-8 at 204,  
8 Tr. 705 (diagnosing bipolar disorder); ECF No. 9-9 at 6, Tr. 712 (diagnosing  
9 Bipolar I Disorder). Further, as noted by Ms. Hernandez-Colwash, she has alleged  
10 functional limitations stemming directly from a bipolar disorder diagnosis. *See*  
11 ECF No. 9-9 at 176, Tr. 882 (describing episodes of mood swings where “I can’t  
12 think straight” and becomes easily distracted, agitated, and irritable). Finally,  
13 Ms. Hernandez-Colwash alleged before the ALJ that she had difficulty  
14 concentrating, ECF No. 9-2 at 66, Tr. 65, that she broke her pelvis in two places,  
15 ECF No. 9-2 at 73, Tr. 72, and experienced mood swings. *Id.*

16 The Commissioner argues that subsequent medical examinations of  
17 Ms. Hernandez-Colwash’s pelvis showed a “stable pelvic ring with no evidence of  
18 any pelvis instability.” ECF No. 18 at 3 (citing ECF No. 9-7 at 74, Tr. 421).  
19 However, Ms. Hernandez-Colwash, in that same examination, reported “some left  
20 inguinal pain.” ECF No. 9-7 at 74, Tr. 421. As such, although Ms. Hernandez-  
21 Colwash’s pelvis may have medically healed, Ms. Hernandez-Colwash was

1 nevertheless reporting pain emanating from that region. Further, due to the low  
2 threshold needed to establish a severe impairment, *see* 1996 WL 374181  
3 (impairments needs to have only more than a “minimal effect” on ability to  
4 perform substantial gainful activity), the Commissioner’s allegations regarding  
5 Ms. Hernandez-Colwash’s vacillation concerning pelvic pain present an  
6 insufficient basis for this Court to conclusively determine that Ms. Hernandez-  
7 Colwash’s pelvic pain was not a severe limitation. Finally, although the  
8 Commissioner asserts that Ms. Hernandez-Colwash’s bipolar disorder is essentially  
9 self-diagnosed and unsupported, *see* ECF No. 18 at 4, numerous examining  
10 physicians noted some form of bipolar disorder diagnosis.

11 The Commissioner argues that “even if the ALJ erred in omitting these  
12 impairments at step two, Plaintiff has not shown that it resulted in any harm.” *Id.* at  
13 5. “A decision of the ALJ will not be reversed for errors that are harmless.” *Burch*  
14 *v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). An error is harmless when it is  
15 “inconsequential to the ultimate nondisability determination.” *Stout v. Comm’r,*  
16 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). Here, however, the ALJ’s  
17 RFC determination did not include potential limitations stemming from an alleged  
18 bipolar diagnosis, including lack of concentration, mood swings, agitation, and  
19 irritation. *See* ECF No. 9-2 at 29, Tr. 28. Further, the RFC determination does not  
20 account for any limitations that might stem from pelvic pain, including difficulty in  
21 sitting for extended periods of time. Overall, the Court cannot determine whether

1 the omission was harmless because the ALJ did not provide a rationale for  
2 rejecting evidence potentially relevant to Ms. Hernandez-Colwash's RFC. *See*  
3 *Black*, 472 F. App'x at 493 (finding that "therefore we do not know whether the  
4 ALJ's omission was 'inconsequential to the ultimate nondisability determination'")  
5 (quoting *Stout*, 454 F.3d at 1055).

6 As Ms. Hernandez-Colwash alleged limitations arising from a pelvic  
7 fracture and bipolar disorder and such impairments are referenced in her medical  
8 records, the ALJ erred by failing to make an express finding regarding the severity,  
9 or lack thereof, of those additional impairments. The Court finds that remand for  
10 further proceedings is appropriate to allow the Commissioner to make the required  
11 findings at step two.

## 12 CONCLUSION

13 As the Court finds that remand for additional findings is appropriate, the  
14 Court need not address Ms. Hernandez-Colwash's allegations of error concerning  
15 the ALJ's credibility finding and rejection of medical opinion evidence. *See Taylor*  
16 *v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1235 (9th Cir. 2011) ("Remand for  
17 further proceedings is appropriate where there are outstanding issues that must be  
18 resolved before a disability determination can be made, and it is not clear from the  
19 record that the ALJ would be required to find the claimant disabled if all the  
20 evidence were properly evaluated."). Further, Ms. Hernandez-Colwash's request  
21

1 for an immediate award of benefits is denied as further proceedings are necessary  
2 to develop the record. *See* ECF No. 13 at 24.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Plaintiff's motion for summary judgment, **ECF No. 13**, is **GRANTED IN**  
5 **PART.**

6 2. Defendant's motion for summary judgment, **ECF No. 18**, is **DENIED.**

7 3. This case is **REMANDED** for a *de novo* hearing before the Social Security  
8 Administration.

9 4. **UPON REMAND**, the ALJ will conduct a *de novo* hearing and issue a new  
10 decision that is consistent with the applicable law set forth in this Order. The  
11 ALJ will, if necessary, further develop the record, reassess the claimant's  
12 residual functional capacity, obtain supplemental evidence from a vocational  
13 expert, and re-evaluate the claimant's credibility.

14 5. **JUDGMENT** shall be entered for the Plaintiff.

15 The District Court Clerk is hereby directed to enter this Order, enter  
16 judgment accordingly, provide copies to counsel, and to **close this file.**

17 **DATED** this 17th day of June 2016.

18  
19 s/ Rosanna Malouf Peterson  
20 ROSANNA MALOUF PETERSON  
21 United States District Judge